

COMMENTS

ARE CONTINGENT FEES ETHICAL WHERE CLIENT IS ABLE TO PAY A RETAINER

One of the most controversial ethical problems which attorneys in this country have ever faced is the contingent fee. Despite frequent discussion of the general problem, there is one aspect of it which has been generally ignored, or only inferentially considered. This concerns whether the client's capacity to pay a retainer has any relevance to the propriety of fixing his fee on a contingent basis. So completely has this question gone unexplored that it cannot be said with certainty that the Canons of Professional Ethics of the American Bar Association² are intended to settle it. The attorneys of Massachusetts have recognized the problem, however, and have adopted a canon which designates as unethical practice the use of a contingent fee contract with a client who is able to pay.³ In the belief that perhaps in practice other attorneys

¹ This question was raised during a dinner discussion meeting of the 1958 Ohio State class in Legal Ethics. Three dinner meetings were held during the quarter in addition to regular classes. Each dinner was attended by the class and between fifteen to twenty members of the bar from Columbus and surrounding communities. At each dinner a different attorney guided the group over a mimeographed set of problems. One of the problems concerned the setting of fees under various circumstances in a land condemnation proceeding. It was in connection with this problem that the question was asked. The discussion at that time indicated a considerable difference of opinion among both the attorneys and the students present. A review of legal literature shed no light on the problem, and indicated that it may never have been adequately discussed before. It was felt that a comment upon the subject might well be called for.

² Hereinafter cited as the Canons or as the A.B.A. Canons.

³ Massachusetts Bar Association Canon XIII: "Contingent fees: A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee shall be a fixed percentage of what he recovers or a fixed sum, either of which may exceed reasonable compensation for any real service rendered. Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful, their fees shall be fixed sums or percentages are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it he, in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interest, in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial."

take the Massachusetts position, a survey has been made of that portion of the Ohio bar represented by the subscribers of the *Ohio State Law Journal*. Results clearly indicate that they do not accept the Massachusetts view. The survey raises, however, other questions for which it provides no answer.

This comment is based upon the assumption that contingent fees are ethical where a client is unable to pay for legal services and where a contingency as to the possibility of a recovery is involved. The final qualification is necessary, since a special risk that the attorney will not be paid does not exist if a recovery is assured. Although the amount of the recovery is uncertain, as in a condemnation case, the penniless client may be classed with those clients who are presently able to pay. The same would be true of a personal injury action where liability was conceded and the only issue in the case was whether damages were \$10,000 as the defendant claims, or \$20,000 as the plaintiff asserts. The arguments against the use of the contingent fee with clients who are able to pay apply with equal force to both of these situations.

There are several reasons why this assumption of validity should be made. First and most important, the bar generally regards this conduct as ethical. Since Canon 13, when adopted, was regarded by the American Bar Association primarily as a device to enable the poor to hire counsel,⁴ it is clear that Canon 13 supports the propriety of the contingent fee where the client is unable to pay.

Secondly, the use of contingent fees in personal injury litigation, the field where the client is considered most likely to be unable to pay, is widespread. Thus the element of custom involved in ethics has begun to be satisfied, and to attempt to change an already established practice is likely to be unsuccessful even if a change in rule could be brought about. Finally, it is felt that the protection of the poor is of sufficient importance to overcome the practical and ethical objections to the use of the contingent fee.

These things considered, it seems best to concede that the contingent fee is ethical where the client is unable to pay and a genuine contingency as to the possibility of recovery exists.

⁴ 33 A.B.A. REP. 61-85 (1908). Mr. T. J. Walsh of Montana, who opposed the adoption of the Canon in a prepared and lengthy speech, discussed what he regarded as the major considerations. His principal objection was that the Canon implied that attorneys who used contingent fees were less ethical than those who did not. He did not discuss the ability of a client to pay and its relation to the use of the contingent fee and relied on the protection it afforded the poor to justify its use. *Id.* at 62, 64-68. Subsequent discussion did not mention any distinction which might be drawn between the use of the contingent fee with the poor and with those able to pay. There did seem to exist, on the part of some, the impression that the Canon required that a contingent fee contract be supervised by the court. *Id.* at 83, 85. Whether those who proposed the Canon had this intention can not be determined.

The problem which this comment discusses is, it is believed, the result of three failures. First is the failure to distinguish between the different situations in which the contingent fee is used, probably the result of applying an individual frame of reference to discussions of the problem. Previous arguments about the contingent fee have centered around the client who is unable to pay directly for legal services. The attackers challenge the propriety of all contingent fees, and the defenders rest their case almost exclusively on the proposition that it is socially necessary to enable those without funds to obtain legal representation.⁵ It is only natural then for the subsequent discussion to ignore the use of the contingent fee where the client can pay. Thus, although it would appear that the defenders had nearly, if unintentionally, conceded the point that the contingent fee is unethical when used with a solvent client, the concession apparently was never recognized and Canon 13 was subsequently adopted.⁶

One early battle is noteworthy since it foreshadows later discussions and illustrates the manner in which the issue is narrowed. It developed between the editor of the *Albany Law Journal*, Irvine Browne, and Judge Edwin Countryman. Judge Countryman, in delivering the 1881 commencement address at the Albany Law School, seems to have attacked the *honorarium* concept of the attorney's fee. In a review of this speech, Browne took the position that cases should not be taken on contingent fees (on "specs," as the practice was known then), if the client was able to pay,⁷ and contended that the bar so supported this

⁵ *E.g.*, "The case for and against the contingent fee, if we disregard considerations of history and what may be called snobbery, may be briefly summarized. The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimant. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee." Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587, 589 (1940).

⁶ The Canons were adopted at the 1908 meeting of the American Bar Association. 33 A.B.A. REP. 55-86 (1908). As initially offered to the meeting Canon 13 read: "Contingent Fees. Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the Court." After numerous amendments were offered, and an attempt to return the Canon to committee had been made, the following wording was adopted: "Contingent Fees. Contingent Fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges." In 1933 the present wording of the Canon was adopted: "Contingent Fees. A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness." 58 A.B.A. REP. 432-34 (1933).

⁷ 23 ALBANY L. J. 441 (1881).

position that he did not realize there was a contrary view.⁸ A series of letters from the Judge, and comments from Browne resulted. The conclusion drawn by Browne was that the practice was "reprehensible, immoral, and disgusting; but the law allows it and the court awards it."⁹ Judge Countryman did not insist strongly that the contingent fee was proper where the client was able to pay. Rather, he asked the question, ". . . if some cases can be taken on specs, how do you draw the line?"¹⁰ Browne suggested that the line be drawn at necessity.¹¹

Other discussions of the contingent fee have come closer and closer to regarding the issue of social necessity as the critical one, and generally the contingent fee alone has not been the author's topic.¹²

Second, since the problem has been ignored, it is no wonder that the ethical standards of the bar have not been applied to the distinction. A part of this failure has resulted from the belief that the standards of the business world will adequately protect the interests of the public. Some believe that the use of the contingent fee itself tends to create the impression with the public and the bar alike that the practice of law is a business, not a profession, because of the implication often connected with the contingent fee that the attorney is concerned solely with money.¹³ Other writers do not seem to connect the two.¹⁴

Most, if not all, attorneys believe that the Canons have settled the contingent fee question. But two points must be noted. The failure of writers to discuss the contingent fee problem fully casts some doubt on just how broadly Canon 13 is to be interpreted. This is especially true since the delegates when the Canon was first adopted in 1908 apparently did not consider the use of the contingent fee other than with a client who could not pay.¹⁵ The same may be said of the New York Bar Association which considered the contingent fee question in the same

⁸ *Id.* at 4, 6 (1881). If the letters received from subscribers are evidence, it appears that Browne was correct as to his latter contention. Letters, 23 ALBANY L. J. 479, 520 (1881); Letters, 24 ALBANY L. J. 18, 59 (1881). See also opinions solicited by Browne from leaders of the bar at 24 ALBANY L. J. 24, 24-27 (1881).

⁹ 24 ALBANY L. J. 4, 6 (1881).

¹⁰ *Id.* at 18, 20 (1881).

¹¹ *Id.* at 4, 5 (1881). The parts of the exchange not previously cited may be found at 23 ALBANY L. J. 479 and at 484 (1881).

¹² *E.g.*, ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 189-193 (1910). The contingent fee is briefly discussed with emphasis on the reason for continuing the practice—to help the poor. CARTER, ETHICS OF THE LEGAL PROFESSION 56-58 (1915). The arguments for the necessity of the contingent fee are presented. COHEN, THE LAW:-BUSINESS OR PROFESSION? 205-10 (rev. ed. 1924). The contingent fee is questioned, and defended only on the ground that it enable the worthy poor to secure able counsel.

¹³ NEW YORK COUNTY LAWYERS ASS'N, OPINIONS ON PROFESSIONAL ETHICS No. 141, 592-94 (1956).

¹⁴ COHEN, THE LAW: BUSINESS OR PROFESSION? 210 (rev. ed. 1924).

¹⁵ *Supra* note 4.

year.¹⁶ And when the Canon was amended in 1933 there is little evidence that careful attention was given to the contingent fee in those situations where a solvent client was involved.¹⁷ Adding to this confusion is the conflict which exists between Canon 13¹⁸ and Canon 10,¹⁹ although this conflict can arguably be resolved. Professor Drinker says the distinction to be made is that Canon 10 condemns the buying of an interest in litigation as a speculation and Canon 13 permits agreeing to accept compensation contingent on the outcome.²⁰ But the distinction is tenuous at best, and fails to give adequate consideration to the similarity, on an ethical plane, between the practices involved.

But there is an even more serious objection to the Canons as a final authority. The Canons, together with tradition, court decision and statute may attempt to mark the ethical way, but, as has been said, professional ethics can never be dependent on a written code.²¹ Ethics involve something beyond an agreement as to what is ethical, and the specificity of the Canons reduces their moral force. They are more a tacitly enacted code of prohibitions than a collection of ethical principles.

Third, the problem has been aggravated by the failure of the bar to develop in all its members a recognition of the importance of maintaining high ethical standards. Admittedly, this recognition is lacking with only a small segment of the bar. Some may relate it to the lack of satisfactory courses in legal ethics in law schools, others to the graduation of attorneys ill-equipped to successfully handle legal problems with the result that moral standards are eroded in an attempt to earn a living. Perhaps one cause of the difficulty is that bar investigations and requirements are not successful in ascertaining the moral qualifications of a prospective attorney. There are those who may regard the problem as more fundamental, and relate it to the deteriorating morality of the

¹⁶ *Report of Committee on Contingent Fees*, 31 REP. N. Y. STATE BAR ASS'N 99-105 (1908). The committee was concerned not with the contingent fee alone, but with its abuse in connection with solicitation. The contingent fee was discussed on the basis that it was used only with the poor.

¹⁷ 58 A.B.A. REP. 428, 432-34 (1933). The amendment was initiated because abuses in the personal injury field had created a need for a standard for charges. The committee stated it did not consider that the contingent fee was limited to use in personal injury cases or where the client had a lack of means. Despite this statement, there is no indication that the committee considered the ethical questions raised when the contingent fee is used with a client who has the ability to pay, although the Massachusetts position was recognized. The committee was of the opinion that the Canons had approved the practice, and stated they would not condemn what the Canons recognized.

¹⁸ The text of Canon 13 is given *supra* note 4.

¹⁹ "Acquiring Interest in Litigation. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting."

²⁰ DRINKER, LEGAL ETHICS 99, 176 (1956). See also ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 190 (1910); WARVELLE, LEGAL ETHICS 89 (2d ed. 1920).

²¹ JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER 14 (1925), quoting Dean Rogers of Yale.

public generally that some commentators observe. Certainly an important factor is the fact that philosophers and teachers have been unsuccessful in reducing moral attitudes to positive standards; thus the nebulous nature of the content of ethics leads to its being ignored.

To evaluate the contingent fee where the client is able to pay it is necessary to consider the early history of the attorney's fee, as well as the origin of the contingent fee in America. It was only with the development of the concept of personal representation that the problem of fees began. In early legal forms each party pleaded his own case. Then in Athens and later in Rome the advocate began to replace the party in pleading the cause. At first no fees at all were charged, and even late in the Roman Empire the fiction of the "voluntary gift" or *honorarium* was maintained, as well as the pretense that the advocate had some personal connection, rather than a professional one, with the party. But as the *honoraria* became involuntary in practice if not in law, and their size increased to a point where Cicero could boast he had received more than the equivalent of \$1,000,000 for his legal services,²² an attempt to revert to the old system was made. The Romans passed a law forbidding all compensation for representatives before a court. Then, as the law proved unworkable, the idea of compensation was accepted, but its amount was limited.²³ Appearing in this period, as they had in Athens, were abuses of the nature of champerty and maintenance²⁴ which led to statutes which attempted to outlaw them.

The extent of the use of the contingent fee during this period is not definitely known, but its use must not have been regarded with favor since Justinian's codification of the Roman laws in 529 A.D. allowed no contingent fees.²⁵

Nothing significant has occurred in the development of fees on the continent from the Justinian Code to modern day. The civil law which is based on the Roman has continued the Roman tradition—with some regulation the attorney's fee remaining essentially an *honorarium* to which the attorney has no real right as a matter of law. Even in France today actions for fees are forbidden,²⁶ as are contingent fees.²⁷

²² Sommerich, *The History and the Development of Attorney's Fees*, 6 RECORD BAR ASS'N OF THE CITY OF NEW YORK 363, 365 (1951), citing *Christin v. Lacoste*, 2 Que. Q.B. 142, 147, 2 Que. B.R. 142, 147 (1893); COOPER, *THE INSTITUTES OF JUSTINIAN* 599 (3d ed. 1852). *Contra*, Browder, *Lawyer's Fees Historically Considered*, 50 AM. L. REV. 554, 557 (1916).

²³ POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 52-54 (1953).

²⁴ These offenses were not, however, those which advocates could commit. Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 65-66 (1935).

²⁵ Sommerich, *The History and the Development of Attorney's Fees* 6 RECORD BAR ASS'N OF THE CITY OF NEW YORK 363, 365 (1951), citing *Suetonius*, Nero 17, Liba 1, Sec. 12.

²⁶ Lepaullle, *Law Practice in France*, 50 COLUM. L. REV. 945, 949-50 (1950).

²⁷ *Id.* at 952; BURDICK, *BENCH AND BAR OF OTHER LANDS* 276 (1939).

Early English experience was closely connected with feudal conceptions of fees which in turn are traceable to the Roman. In England, contingent fees are closely connected with champerty. This abuse, still associated with the contingent fee even in this country, was not originally an offense which an attorney could commit, according to Radin.²⁸ Later it lost its original form, and became a lawyer's infraction.²⁹ Some relate the English statutes against champerty and maintenance to the periods of the great confiscations of property under the Norman kings, and later under Henry VIII, when those in power did not want litigation encouraged. They view these statutes as oppressive legislation.³⁰ And today, while there may be a question as to whether it is champerty, the contingent fee is clearly illegal in England.³¹ It should be noted that since the costs assessed against a losing party include attorney's fees, there is no need in England to develop a contingent fee system.

The contingent fee in America was the result of the industrial revolution—surely our traditions were against it. From the period of the thirteen colonies our economy was largely colonial until the middle of the nineteenth century. Then the development of the railroad provided the catalyst to turn our rich resources into goods by increasing the mobility of our population, and freeing the development of industry from dependency on water transportation. The impact of the railroad and this country's entry into the period of the industrial revolution brought changes of great magnitude.

The revolution in our industrial economy also brought a revolution in the character of the bar. As the bar turned to handle the business of new corporations and the problems of our burgeoning economy, much of the charitable work which had been a part of the older practice was abandoned.³² Also, the development of industry brought a new type of litigation. More and more people were injured and could claim compensation only if a difficult course of litigation was pursued. But the injured had no means to pay for an attorney unless they could successfully press their claims against their employers. If the injury was caused by the negligence of another employee, to sue him would be pointless. Usually, he would be unable to pay a judgment. The tremendous economic and social pressures brought with them the contingent fee as a solution to the injustice often being experienced by the poor.³³ And when these same pressures later brought workmen's compensation, the

²⁸ Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 65-66 (1935).

²⁹ *Ibid.*

³⁰ *Greenleaf v. Minneapolis, St. P. & S. Ste. M. Ry.*, 30 N.D. 112, 151 N.W. 879 (1915), reprinted in COSTIGAN, *CASES ON LEGAL ETHICS* 497-502 (1917).

³¹ Radin, *Contingent Fees in California*, 28 CALIF. L. REV. 587, 588 (1940).

³² SMITH, *JUSTICE AND THE POOR* 85 (3d ed. 1919).

³³ *Ibid.*; BROWN, *LAWYERS AND THE PROMOTION OF JUSTICE* 209, quoted in 72 AM. L. REV. 672 (1938).

contingent fee remained in personal injury litigation, and spread to other areas of the law.

Today, the United States almost alone of the nations whose rule can be ascertained, permits the contingent fee. And even here its use is more limited than often realized.³⁴ On the continent, Belgium does not permit the contingent fee.³⁵ The same is true of Italy,³⁶ Germany,³⁷ and Switzerland.³⁸ Spain appears to allow the contingent fee,³⁹ as did Russia until the revolution.⁴⁰

Moving to the western hemisphere, the contingent fee is regarded as champertous in the provinces of Canada, except in Manitoba, where a statute permits a lawyer to bargain for an interest in the subject matter of the litigation.⁴¹ Although recent information is not available, the Latin American countries appear to have a mixed reaction to the contingent fee.⁴² And, finally, Puerto Rico has adopted its own canons which are similar to the ABA Canons and which recognize the propriety of the contingent fee.⁴³

In America thirty-five states of our fifty have signified approval of the ABA Canons, including Canon 13.⁴⁴ The District of Columbia has also adopted the ABA Canons. Twelve states have adopted their own

³⁴ *Infra* p. 337.

³⁵ COHEN, *THE LAW: BUSINESS OR PROFESSION?* 207 (rev. ed. 1924), citing 34 LAW MAG. AND REV. 271.

³⁶ *Id.* at 206, citing the ITALIAN CIVIL CODE §1458.

³⁷ SCHLESINGER, *COMPARATIVE LAW, CASES AND MATERIALS* 307-13, 317 (1950).

³⁸ *Id.* at 313-17.

³⁹ OBREGON-BORCHARD, *LATIN-AMERICAN COMMERCIAL LAW* 733-34 (1921).

⁴⁰ KUCHEROV, *COURTS, LAWYERS AND TRIALS UNDER THE LAST THREE TSARS* 126 (1953); 1 GSOVSKI, *SOVIET CIVIL LAW* 852-55 (1948).

⁴¹ ORKIN, *LEGAL ETHICS* 159 (1957). The Canons of Legal Ethics of the Canadian Bar Association, Canon 3(7), read: "He should not, except as by law expressly sanctioned, acquire by purchase or otherwise, any interest in the subject matter of the litigation being conducted by him."

⁴² OBREGON-BORCHARD, *op. cit. supra* note 39, at 733-36.

⁴³ BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES* 569 (1956).

⁴⁴ The following states, either officially by statute or court rule, or unofficially by state bar resolution, in some cases with minor changes, have adopted the ABA Canons: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Hawaii has adopted the Canons "except where the same are in conflict with Hawaiian decisions." All fees, including contingent fees are prohibited where a poor claimant sues in an action "without costs." REVISED LAWS OF HAWAII 229-10 (1955). North Dakota has adopted the Canons, but there exists a question as to the power of the state bar, which is organized and regulated by statute, to adopt a code of ethics. BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES* 474 (1956). Tennessee has adopted the Canons in part. The bar has adopted only the first thirty-two canons, but the supreme court, and the court of appeals have adopted the full canons as to their own courts.

canons and approved of the contingent fee either in those canons or by court decision.⁴⁵ Only one state, South Carolina, has not adopted a set of canons, but the contingent fee is approved by court decision.⁴⁶

Only two states have not accepted the majority rule. Maine has adopted her own canons which are similar to the ABA Canons except that contingent fees are disapproved. In Massachusetts, as has been noted, they are permitted only if the client has no funds to employ counsel unless he prevails, and if their amount does not exceed reasonable compensation.⁴⁷

There are a few other situations in which the contingent fee is not permitted, or where its use is restricted. As a general rule, a contingent fee may not be used where a divorce is to be sought.⁴⁸ And, usually,

⁴⁵ Alabama has adopted its own canons, but they do not include a canon on fees. *Ex parte Wilkinson*, 220 Ala. 529, 126 So. 102 (1929), recognizes the propriety of a contingent fee contract. California has adopted its own canons, but they do not include a canon on fees. The ABA Canons are commended to members by the state bar association. *Wilhelm v. Rush*, 18 Cal. App. 2d 366, 369, 63 P.2d 1158, 1160 (1937), states that contracts for contingent fees are valid in California. See also Radin, *CONTINGENT FEES IN CALIFORNIA*, 28 CALIF. L. REV. 587 (1940). Illinois has adopted its own canons which are similar to the ABA Canons, and which permit the contingent fee. Louisiana has adopted its own canons which are similar to the ABA Canons, and which approve the contingent fee. Statute allows an attorney to acquire an interest in the subject matter of a suit, and provides that such a contract may include a provision that neither the attorney, nor the client, can settle the suit without the other's approval. LA. REV. STAT. 37:218 (1906). Mississippi had adopted its own canons which are similar to the ABA Canons, and which recognize the contingent fee as proper. Missouri has adopted its own canons which are similar to the ABA Canons, and which permit the contingent fee. Nevada has adopted its own canons, but they do not include a canon on fees. The ABA Canons are commended to members by the state bar association. *Cooke v. Gove*, 61 Nev. 55, 114 P.2d 87 (1941), recognizes the validity of a contract for a contingent fee by implication. North Carolina has adopted its own canons which are similar to the ABA Canons, and which recommend and approve the contingent fee except in cases of guardianship and minors. Oregon has adopted its own canons, but they do not include a canon on fees. The ABA Canons are commended to members by the state bar association. Statute provides that between attorney and client the measure and mode of compensation shall be left to the agreement of the parties. ORE. REV. STAT. 20.010 (1862). See *Dahms v. Sears*, 13 Ore. 47, 11 Pac. 891 (1886), which holds an attorney may contract for a contingent fee. See also *Craig v. Maher*, 158 Ore. 40, 47, 74 P.2d 396, 399 (1937), a more recent statement of the rule. Rhode Island has adopted its own canons which are similar to the ABA Canons, and which recognize the propriety of the contingent fee. Texas has adopted its own canons which are similar to the ABA Canons, and which recognize the propriety of the contingent fee. Utah has adopted its own canons which include the ABA Canons with slight changes.

⁴⁶ *Adair v. First Nat'l Bank of Clinton*, 139 S.C. 1, 137 S.E. 192 (1927), holds that a contract for a contingent fee is valid and binding.

⁴⁷ *Supra* note 3.

⁴⁸ Annot., 30 A.L.R. 188 (1924). See *Whitney v. Ewing*, 24 Ohio C.C.R. (n.s.) 69 (Cir. Ct. 1903); 6 OHIO JUR. 2D *Divorce* § 59 (1954).

state workmen's compensation acts, by giving control over compensation to the commission, have led to the elimination of the contingent fee in that area.⁴⁹ There are also a number of other minor areas in which the use of contingent fees is limited or prohibited altogether.⁵⁰ And in at least one state where the ABA Canons have been adopted statutes have been passed which attempt to provide certain safeguards when the contingent fee is used.⁵¹

History does not seem to make clear whether the traditional objection to a contingent fee rests solely on moral grounds, or upon the view that it is inconsistent with the *honorarium* conception of fees and is related too closely to the promotion of litigation. In the time of Justinian the basis of the objection was moral as evidenced by the phrase, "*Ille piraticus mos est.*" (That is the moral of a pirate.)⁵² The exact nature of this moral objection is unknown. And since it may be argued that the contingent fee has lost its connection with the offense of champerty, history alone does not seem to offer a final answer to the problem.

Turning to the particular use of a contingent fee under discussion here, namely, where the client is able to pay a retainer, all the arguments which have been made against the contingent fee generally are applicable here. That is: where a client is able to pay, all the evils of

⁴⁹ See, e.g., *Cranston v. Industrial Comm'n*, 246 Wis. 278, 16 N.W.2d 865 (1944), where a statute limiting attorney's fees to ten per cent of the award received unless the commission fix the fee, is found to be constitutional.

⁵⁰ Private bills passed by Congress uniformly include a statement that attorney's fees can not exceed ten per cent of the amount appropriated. Shipley, *The Contingent Fee*, 28 N. Y. STATE BAR BULL. 416, 419 (1956). In some veteran's cases Congress has set a flat fee of \$10.00 for filing claims and limited attorney's fees to ten per cent of the judgment if the case goes to court. 38 U.S.C. § 551 (1924). The Federal Tort Claims Act places a twenty per cent limit on attorney's fees. 28 U.S.C. § 2678 (1948). A number of administrative agencies have rules which limit the use of the contingent fee. Shipley, *supra* at 419.

⁵¹ Pennsylvania, in addition to the Canons, has provided other safeguards where contingent fees are used. Rule 202 of the Pennsylvania Rules of Civil Procedure provides that a contingent fee contract must be in writing, in duplicate, one copy for the attorney and one for the client. The attorney is to retain the contract for two years after judgment or settlement of the case. Rule 202 of the Philadelphia Common Pleas Courts provides safeguards in addition to those of the state rule. See *Gair v. Peck*, 6 Misc. 2d 739, 165 N.Y.S.2d 247, *aff'd per curiam* 5 App. Div. 2d 303, 171 N.Y.S.2d 259 (1958), where it was held that the Appellate Division of the Supreme Court of the State of New York in the First Judicial Department had no power to regulate or adopt a rule regulating contingent fees in personal injury and wrongful death cases. Rule 4 of the Special Rules, Appellate Division, first adopted in 1956, had set a scale of fees with maximum percentages for contingent fee contracts and stated that fees in excess of those provided for in the rule were a violation of the Canons unless the court had approved the contract. The *Gair* case is critically viewed in *Collings & Schneider, Civil Remedies and Procedures*, 32 N.Y.U.L. Rev. 1496, 1513-14 (1957).

⁵² Sommerich, *supra* note 25.

the contingent fee contract exist, and yet the great justification for its use is not present, since no indigent person is being helped to press a cause of action whose merits could not otherwise be tested.

In weighing the validity of this argument some appraisal must be made of the contentions against the contingent fee, for if these are unpersuasive, then there is no need to justify its use in this situation.

The traditional arguments against the contingent fee have been compiled below.⁵³ It seems that the soundest are those which are based on the proposition that the contingent fee creates a conflict between the self-interest of an attorney and the duty he owes his client. Attorneys *are* honest men, but ethical principles assert that honesty is not enough. A fiduciary, for instance, may not legally or ethically sell himself the property of his trust, however fair the price. This rule is not based on the idea that fiduciaries are dishonest, but rather that, *despite* their honesty, in such a sale they are incapable of giving an impartial judgment. Each of an attorney's clients is entitled to impartial advice. Unless it is necessary, an attorney is not justified in hazarding his client's cause with a contingent fee contract.⁵⁴

On the other hand, the weakest arguments are those which imply that there is actually something dishonest in an attorney's use of a contingent fee. For example, it is doubtful that the traditional argument that such a fee encourages unworthy suits has much validity. It is hard to believe that an attorney will take unworthy claims when there is a

⁵³ The contingent fee stirs up litigation by enabling the owners of unworthy claims to prosecute them without risking an attorney's fee in case of loss and encourages them to attempt to get a settlement for the nuisance value of the claim. It makes the attorney a partner rather than a counselor so that he is no longer an officer of the court, but a litigant presenting his case, and he is no longer able to give impartial advice, or is tempted to achieve success by fair means or foul. In setting the amount of the contingent fee he is tempted to overreach his client, in fact if not in law, since the client is often inexperienced, eager for advice, and the payment of a contingent fee seems to be no problem. He is also tempted to settle a case as early as possible, even at the client's disadvantage, for often in this way he can gain the highest possible dollar per hour fee. These contracts debase the profession by valuing successful services only, and equate successful outcome with successful practice. The contingent fee may simplify the problem of the fee when a case is lost, but such an approach ignores the duty of the bar to educate the public that the right to a day in court is worth something, even if the cause is itself lost. Excessive fees result, leading to client dissatisfaction, since the contingent fee means that no real consideration has been given to the value of the services rendered, and that the case has been undertaken as a joint speculation. Even if a contingent fee is not excessive, the fact that it is often a percentage of recovery makes it appear to the layman that it has no relationship to the services performed.

⁵⁴ The right to freedom of contract is not an absolute answer. The question is always how much freedom should be permitted. It would be unethical for an attorney to contract with his client for a ninety-five per cent contingent fee, however openly arrived at. This conclusion limits an attorney's freedom to contract, but to admit that this is a limitation does not somehow excuse the conduct.

risk he may not be paid for pressing them, and reject them when he will be paid win or lose. If it be said that these claims might be taken for their nuisance value, it may be answered that the time involved, generally, in pressing a nuisance action is slight, and, therefore, the contingent fee offers only a small advantage over a retainer to the client. Unworthy claims may be pressed, but they are more likely to be encouraged by unethical attorneys who would behave similarly were they operating on a retainer basis than by the existence of the contingent fee.

It does seem logical, however, that the contingent fee may encourage litigation. This is the rationale of holding a contingent fee contract improper if a divorce is involved.⁵⁵ Where lengthy legal proceedings can be foreseen and there is the prospect of sizable attorney's fees, win or lose, the existence of the contingent fee may be a factor leading to the decision to file suit. If the claim is meritorious, however, should it be discouraged?

A distinction which may be drawn between the different arguments against the contingent fee is that some require a conscious course of unethical or improper action. Where conscious violation occurs it may be doubted that a change in Canon 13 would do more than shift these abuses to another area. Therefore, it is doubtful if those arguments which depend on conscious impropriety should be given any substantial weight in considering the propriety of the contingent fee. These or similar abuses will exist whatever the rule. Other arguments against the practice, however, do not involve a deliberate violation of an ethical principle. They exist in the nature of the practice itself. It is these difficulties which can be ended by a change in rule.

It should be noted that, except for contentions by way of reply, the arguments which generally are offered to support the propriety of the contingent fee are based on practical rather than ethical considerations.⁵⁶ These arguments seem to concede that there may be evils connected with the contingent fee, but submit that policy or practicality justifies the risk.

⁵⁵ See authorities cited note 47.

⁵⁶ The principal arguments which have been offered in support of contingent fee contracts include: Contingent fee contracts are made between intelligent, capable parties fully aware of their interests and rights. These parties should be free to contract as they like. After careful consideration and deliberation the question as to the propriety of these contracts was settled by the ABA, and both before and after Canon 13 was adopted, the tradition of the contingent fee was well established. Most of the arguments directed against contingent fees are not sound. For example, contingent fees reduce litigation, not encourage it. No attorney will take a bad case when his only compensation depends on the successful handling of a suit. All fees are contingent more or less and the bar never charges as much for failure as for success. The contingent fee is the only way for a young attorney to get a start. Until he has a reputation as a successful attorney, retainer clients will go elsewhere. Clients, being human, feel that their attorney will work harder for them where the fee is contingent, and sometimes the acceptance of a retainer may give the client the feeling that he should control his

Returning to the specific case of a client who is able to pay, it will be argued that the propriety of the contingent fee does not depend solely on the fact that it helps the poor. There are many other arguments which sustain it.⁵⁷ This being true, the contingent fee in this particular case cannot validly be distinguished from the contingent fee generally, and it follows that if one is ethical so is the other; and the conflict of interest which the contingent fee is supposed to create is the unavoidable conflict of interest between attorney and client. Moreover, any attempt to distinguish between contingent fees where the client can, and cannot pay, ignores the basis on which an attorney can afford to offer his help to the poor. It is obvious that an attorney must charge more to those clients who can pay in order to enable him to give his aid to those unable to afford it. At present, the gain from handling a successful contingent fee case is offset by the handling of an unsuccessful one. Were it unethical to utilize a contingent fee except with those unable to pay for services, the result would be that the indigent would be the only support for pressing the claims of the indigent. The burden of offering legal assistance to the financially distressed, it is contended, should rest upon the bar and the financially capable rather than on those who can least afford it.

In weighing these arguments care must be taken that logic is not affected by emotion. In any such appraisal it is fundamental that the most careful consideration be given those arguments which contend that there is, or that there is not, a public good which is served by the use of such a fee.

One thousand three hundred and twenty-seven questionnaires were mailed to selected Ohio subscribers of the *Ohio State Law Journal*. The text of the letter setting forth the problem, and a sample postal reply card on which the questions were printed are reprinted below.⁵⁸ It should

attorney's discretion. It is a good measure of the value of services, and encourages each attorney to do his best. Moreover, where a retainer is agreed to, the problem of collection if the case is lost is very difficult, while with a contingent fee the problem is avoided. Some persons with proper claims are discouraged from suing solely because of the time they will lose. If there were no contingent fee, insurance companies and others would have a field day in forcing settlements. The contingent fee is the only thing which makes the practice of personal injury law possible; without it only a few clients could afford the necessarily heavy retainer and this might lead to the creation of an administrative bureau, such as in workman's compensation. The specter of overreaching is often raised, but clients may be overcharged by unscrupulous attorneys with or without the contingent fee. A profession must rely on the high standards of its members, rather than on arbitrary rules of conduct.

⁵⁷ See note 5 *supra*.

⁵⁸ Dear Subscriber:

What is *your* opinion? A question concerning the contingent fee has arisen despite the Canons. It has been suggested that the use of a contingent fee is unethical where either (1) no contingency as to a recovery is involved, but only

be noted that both completeness and specificity were sacrificed in the questionnaires to reduce its length, and thus increase the number of re-

a contingency as to amount; or (2) where the client is fully able to pay for the legal services required. This question assumes that a contingent fee is ethical where the client is unable to pay for legal services and where the suit may result in no recovery at all. Perhaps three examples can bring the issue into focus:

(1) A farmer consults attorney *A*. His farm is being condemned and the state's offer is unsatisfactory. *A* is certain that his client will gain by filing suit. He offers to handle the case for 1/3 of the amount recovered above the state's offer.

(2) Attorney *B* is consulted by a disinherited heir where reasonable grounds to contest the will exist. *B* offers to handle the suit for \$2000, payable only if he wins the case, and the heir agrees although he has funds to hire *B*. Assume that were *B* to charge his regular rate, his fee would be \$1000.

(3) Attorney *C* signs a 1/3 contingent fee agreement with a client who has a personal injury claim. The client can pay for counsel, win or lose.

Several arguments can be made to support the propriety of the above agreements: The Canons approve of contingent fees and make no exceptions. Since this type of fee is a good measure of the value of services given, attorneys frequently use this type of agreement. The courts may be counted on to protect clients against exploitation in case of abuse. Some clients desire this kind of contract since they have to pay only if they receive something.

Arguments against the propriety of the above agreements include: These contracts have all the evils of the contingent fee—they encourage litigation, they make the attorney a partner rather than a counselor, they increase the possibility of overreaching in fact if not in law—and yet do not offer any benefit which justifies their use. No indigent person is being helped to enforce an otherwise worthless cause of action. These contracts debase the profession by valuing only successful services. Some clients desire these contracts only until they win and see how much the attorney will receive.

Your Law Journal is conducting a survey concerning this question, the results of which will be published in the Spring, 1959 issue. Only with your help can the survey be an accurate report of the opinion of our subscribers. It will be appreciated if you will indicate your opinion by appropriate check marks on the enclosed, prepaid reply card. Cards need not be signed, and additional comments by letter are welcomed.

* * *

Please answer the following questions by checking the appropriate square after reading the accompanying letter. Checking square 1 means "yes," 2 "undecided but probably yes," 3 "undecided," 4 "undecided but probably no," and 5 means "no."

In my opinion:

- | | 1 | 2 | 3 | 4 | 5 |
|--|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| 1. Is the contingent fee where the client is unable to pay and where the suit may result in no recovery at all ethical? | <input type="checkbox"/> |
| 2. Did lawyer A's conduct involve unethical practice? | <input type="checkbox"/> |
| 3. Did lawyer B's conduct involve unethical practice? | <input type="checkbox"/> |
| 4. Did lawyer C's conduct involve unethical practice? | <input type="checkbox"/> |
| 5. Assuming their conduct was ethical, was it desirable as a practical matter? | <input type="checkbox"/> |
| 6. Will an attorney using a 1/3 contingent fee, on winning a case, get a larger, or a smaller fee than if he had taken the case on retainer? | | | | | |
| What percentage larger or smaller? | | | | | |
- Check one: Larger Smaller
- %

sponses.⁵⁹ While it is perhaps true that the group polled cannot be regarded as representative of the legal profession generally, both because of its geographic limitation, and because a subscription to a law journal may indicate a greater than average interest in the progress of the law, the comparative uniformity of the responses lends validity to the conclusions which may be drawn from the sampling.

The problem—are contingent fees ethical where the client is able to pay—was presented to those polled around the following three examples:

(1) A farmer consults attorney *A*. His farm is being condemned and the state's offer is unsatisfactory. *A* is certain that his client will gain by filing suit. He offers to handle the case for 1/3 the amount recovered above the state's offer.

(2) Attorney *B* is consulted by a disinherited heir where reasonable grounds to contest the will exist. *B* offers to handle the suit for \$2,000, payable only if he wins the case, and the heir agrees, although he has funds to hire *B*. Assume that were *B* to charge his regular rate, his fee would be \$1,000.

(3) Attorney *C* signs a 1/3 contingent fee agreement with a client who has a personal injury claim. The client can pay for counsel, win or lose.

The following questions were then asked, and by checking squares numbered from 1 to 5, the answers, "yes," "undecided but probably yes," "undecided," "undecided but probably no," and "no" could be indicated:

1. *Is the contingent fee where the client is unable to pay and where the suit may result in no recovery at all ethical?*
2. *Did lawyer A's conduct involve unethical practice?*
3. *Did lawyer B's conduct involve unethical practice?*
4. *Did lawyer C's conduct involve unethical practice?*
5. *Assuming their conduct was ethical, was it desirable as a practical matter?*

Then these questions were asked:

6. *Will an attorney using a 1/3 contingent fee, on winning a case, get a larger, or a smaller fee than if he had taken the case on retainer?*

What percentage larger or smaller?

Finally, the subscriber was asked to indicate whether he was a judge, an individual practitioner, a member of a partnership, not a practicing

7. Check one: I am: Judge ; Not a practicing attorney ; Individual practitioner ; Member of a partnership ; Other .

8. Check one: I practice in a town under 25,000 ; over 25,000 .

⁵⁹The answers to the following questions would have been helpful in evaluating the desirability of the contingent fee where the client is able to pay a retainer: What percentage of your cases, if any, are handled on a contingent basis? What percentage of your contingent fee cases involve clients too poor to pay a retainer? What percentage of your contingent fee clients are unsatisfied with the amount of your fees? What percentage of your retainer clients are unsatisfied with the amount of your fees?

attorney, or something else. And he was asked to indicate whether or not the town where he practiced, assuming he did, had over 25,000 population.

A total of 578 cards were returned to the *Journal*, some with interlineated comments, and twelve letters were received. The following chart indicates the character and distribution of the responses.

	Yes	Undecided		Undecided		No Answer	Total
		But Probably Yes	Un-decided	But Probably No	No		
Question 1	483	22	21	4	36	12	578
Question 2	71	25	6	32	439	5	578
Question 3	110	74	33	53	310	8	578
Question 4	77	28	8	26	428	11	578
Question 5	337	55	28	36	83	39	578
Question 6			Larger 391	Same 12	Smaller 31	144	578
	0-25%	26-50%	51-75%	76-99%	100-300%		
Per cent larger	115	59	13	1	24	179	391
Per cent smaller	19	5	1	--	--	6	31
	I. Prac. 303	Part. 186	Judge 20	No Prac. 30	Other 33	6	578
					Under 25,000 143	Over 25,000 435	578

An attempt was made to analyze the responses by grouping them on the basis of the size of the responder's town, on the character of his work, and finally, on the percentage larger or smaller given in answer to question six. There was no significant variation from the pattern established by all responses on the basis of these groupings.

The contingent fee itself stands almost unchallenged among those polled. Although there was a drop in the number approving the contingent fee in various situations where the client could pay, a great majority still supported its propriety.⁶⁰ Question five was designed to encompass any conceivable objection which an attorney might not regard as of an ethical nature. Those who had some "practical" objection to the contingent fee where the client could pay were of a greater number than those who objected on ethical grounds, but, generally speaking, those who objected for one reason objected for both. Thus there is nothing to indicate a gap between the ethical and the practical concerns of the group polled.

⁶⁰ Additional ethical considerations may have accounted for the drop. Some may have felt, since the possibility was not expressly negated, that full disclosure had not been made. Others may have felt that it is improper for an attorney to offer a contingent fee, but not to accept one if offered.

While a substantial number of those polled felt that no reply could be made to question six because of the number of variables involved, sixty-seven per cent agreed that a contingent fee would be larger than a retainer fee if applied to the same case. Forty-six per cent of those who felt the contingent fee would be larger indicated they were unable to state how much the difference would be. Twenty-nine per cent, however, agreed that the percentage larger would not exceed twenty-five per cent, and fifty-four per cent agreed if only those who attempted to give an answer are considered.

It would be interesting to speculate as to the significance of the replies given to question six. Do they indicate an attorney will do better handling cases on a retainer rather than on a contingent basis? Standing by itself, a twenty-five per cent premium for handling a case on a contingent fee does not seem high when it is considered that some will result in no fee at all. At least one more question must be answered before it can be said on the basis of this survey whether or not the contingent fee means excessive fees. How many contingent fee suits result in no recovery? To this question we, unfortunately, can give no answer.

John Y. Taggart